

CWA 404 ASSUMPTION

ISSUE:

- Congress gave states and tribes the authority to assume the Clean Water Act (CWA) section 404 dredged and fill permitting program for certain waters within the state/tribal lands. Under section 404(g) the EPA approves state and tribal requests to assume the program.
- Since the CWA was enacted in 1972 just two states, Michigan and New Jersey, have assumed the CWA section 404 program.
- The EPA has worked with various states and tribes over the years who have considered assumption, but for various reasons chose not to pursue the program. Currently we are actively working with Florida, Indiana, Arizona, Oregon, and Minnesota and several others have expressed potential interest.
- In addition, the Agency has initiated a rulemaking to revise our 1988 assumption regulations to clarify requirements such as the subset of waters which can be assumed under an approved state or tribal program.

TALKING POINTS:

- The EPA announced in its Spring Regulatory Agenda its plan for the first comprehensive revision to the existing section 404(g) regulations since 1988, and we anticipate proposing these revisions in Fall 2019.
- The EPA intends to improve the usability of these regulations, clarify requirements such as the waters which can be assumed under an approved state or tribal program, and foster a greater long-term effectiveness by the states and authorized tribes in assuming the program.
- While the EPA moves forward with this important rulemaking, we will continue to work with states and tribes interested in assuming the section 404 permit program.

BACKGROUND:

- States and tribes cite various reasons for not assuming the program including: lack of dedicated federal funding, inconsistency between state and federal authorities, lack of partial assumption authority, and challenges in identifying the waters which the U.S. Army Corps of Engineers retains jurisdiction.
- The EPA established a Federal Advisory Committee Act (FACA) subcommittee in 2015 to provide recommendations on how the EPA could clarify which waters of the U.S. a state or tribe assumes section 404 permitting responsibility and for which waters the U.S. Army Corps of Engineers (Corps) retains this authority. The full committee submitted the subcommittee's recommendations to the Administrator in June 2017.
- On August 7, 2018, the Assistant Secretary of the Army for Civil Works issued a memorandum to the Corps clarifying what waters states and tribes may assume. The memo is consistent with the Assumable Waters Subcommittee's majority view regarding the scope of retained waters under Section 404(g).
- There are no funds specifically appropriated for implementation of a state or tribal CWA 404 program. However, states can use their CWA 106 grant monies to fund implementation of CWA 404 programs. Additionally, states and tribes can compete for wetland program development grant funds to develop and assume the program.